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No. 02-241

In the Supreme Court of the United States

BARBARA GRUTTER, PETITIONER

v.

LEE BOLLINGER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
RALPH F. BOYD, JR.
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
DAVID B. SALMONS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BRIAN W. JONES
General Counsel
Department of Education
Washington, D.C. 20202

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QUESTION PRESENTED

Does the University of Michigan Law School's use of racial preferences in student admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), or 42 U.S.C. 1981?

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INTEREST OF THE UNITED STATES

The United States has the responsibility for enforcing numerous federal statutes prohibiting discrimination on account of race and ethnicity[1] and, accordingly, has frequently participated in the Supreme Court, both as a party and as amicus curiae, in cases presenting constitutional and statutory claims of discrimination.[2]

[1] See, *e.g.*, 42 U.S.C. 2000h-2, 2000e-5(f)(1); Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980).

[2] See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103 (2001); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995); *Georgia* v. *McCollum*, 505 U.S. 42 (1992); *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547 (1990); *City of Richmond* v. *J.A. Croson Co.*,

The Department of Justice has significant responsibilities for the enforcement of the Equal Protection Clause of the Fourteenth Amendment in the context of public education, see 42 U.S.C. 2000c-6, including admission to public colleges and universities, and also has responsibility for enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination of the basis of race, color, or national origin by recipients of federal financial assistance. The United States Department of Education has parallel responsibility for the administrative enforcement of federal civil rights laws affecting educational institutions, including Title VI.

STATEMENT

1. The Law School at the University of Michigan offers admission to an estimated 1000 applicants and enrolls approximately 350 students each year. Pet. App. 199a. It seeks to admit the most capable students and relies on an index score, which represents a composite of an applicant's score on the Law School Admissions Test (LSAT) and undergraduate grade-point average (GPA), to assess a candidate's qualifications. *Id.* at 193a-194a.

In 1992, the full faculty at the Law School adopted its current admissions policy. The policy affirms the Law School's "commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics, and Native Americans," who, without some preference, "might not be represented in [the] student body in meaningful

488 U.S. 469 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *University of Cal. Regents* v. *Bakke*, 438 U.S. 265 (1978).

numbers." Pet. App. 198a. The policy provides that the Law School makes "special efforts" to increase the number of such students because they "are particularly likely to have experiences and perspectives of special importance" and the enrollment of a "critical mass" of such preferred minority students ensures their ability to make "unique contributions to the character of the Law School." *Ibid.*[3]

2. In 1997, petitioner, Barbara Grutter, an unsuccessful white applicant to the Law School, brought this action on behalf of a class of similarly situated individuals, challenging the legality of the Law School's race- and ethnic-based admissions program. Pet. App. 189a-190a. She alleged that the Law School, in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, relies on race and ethnicity as "predominant" factors in admissions decisions and favors certain minority groups, giving their members "a significantly greater chance of admi[ttance] than students with similar credentials" not subject to the preference. Pet. App. 190a.

After a 15-day bench trial, the district court held that the Law School's race- and ethnic-based admissions program violates the Equal Protection Clause of the Fourteenth Amendment and Title VI and enjoined the Law School from using race and ethnicity in its admissions decisions. Pet. App. 292a. The court explicitly rejected the Law School's claim that an applicant's race

[3] The Law School's rationale for seeking diversity has not always been consistent. As recently as 1996-1997, the Law School stated that it sought diversity "to further 'the public interest in increasing the number of lawyers from groups which the faculty identifies as significantly underrepresented in the legal profession.'" Pet. App. 224a n.24 (quoting Exh. 6, at 81).

and ethnic status is "merely one factor which is considered among many others in the admissions process." *Id.* at 225a. Rather, the court found that there was "mathematically irrefutable proof that race is indeed an enormously important factor" at least to the extent necessary to enroll a "critical mass" of preferred minority students, which "has meant in practice" that the Law School seeks an entering class comprised of approximately 10% to 17% African-American, Native American, and Hispanic students, or "roughly equal to the percentage [these preferred groups] constitute of the total applicant pool." *Id.* at 227a, 225a. The court also found that administrators at the Law School charged with the responsibility of assembling an entering class that matches its numerical target consult daily reports, which classify applicants by race and reflect the number of candidates who have applied, been accepted, been placed on the waiting list, and paid a deposit, for the entire applicant pool, and separately for various racial and ethnic groups. *Id.* at 207a-208a, 229a, 230a.

The district court further ruled that an interest in promoting experiential diversity could not justify the Law School's race- and ethnic-based admissions program since "[t]he connection between race and [diversity of] viewpoint is tenuous, at best." Pet. App. 245a. Likewise, the district court ruled that an interest in remedying societal discrimination did not justify the Law School's use of race. In addition, it held that the Law School's race-based admissions policy failed the narrow-tailoring component of strict scrutiny because the Law School imposed "no time limit" for the use of preferences; the policy was functionally "indistinguishable from a straight quota system," since the Law School reserves a minimum percentage of each entering

class for preferred minorities so that those seats are "insulated from competition" and "students of all races are not competing against one another" for them; and the Law School failed to give "serious consideration to race-neutral alternatives." *Id.* at 247a, 248a-249a, 251a.

3. a. The court of appeals sitting en banc reversed in a split (5-4) decision and vacated the district court's injunction barring the Law School from considering race and ethnicity in its admissions decisions. Pet. App. 4a. It held that the Law School's interest in enrolling students with a diverse array of experiences and viewpoints is compelling "[b]ecause Justice Powell's opinion [in *Bakke*] is binding on this court under *Marks* v. *United States*," 430 U.S. 188 (1997). *Id.* at 12a.

As to narrow tailoring, the court of appeals ruled that the Law School's admissions program is constitutional because it "closely fits" its goal of achieving diversity of viewpoint and experience, considers race merely as a "potential 'plus' factor" among other elements, and is "virtually identical" to the Harvard plan approved by Justices Powell and Brennan in *Bakke*. Pet. App. 27a, 32a. It rejected the district court's and dissent's view that the Law School's pursuit of a "critical mass" of preferred minorities was the "functional equivalent of a quota," because the Law School "has no fixed goal or target" and a preference will "always produce some percentage range of minority enrollment," which "will always have a bottom, which, of course, can be labeled the minimum." *Id.* at 29a. Similarly, the majority rejected petitioners' statistical evidence demonstrating that preferred minorities are admitted with much lower index scores than non-favored applicants, reasoning that such data is "the logical result" of any race-based admissions program. *Id.* at 31a. The court of appeals also refused to second-guess the Law School's judg-

ment about race-neutral alternatives, concluding that courts "are ill-equipped to ascertain which race-neutral alternatives merit * * * consideration." *Id.* at 35a. In addition, it reasoned that even though the Law School's "consideration of race and ethnicity lacks a definite stopping point," its program is nonetheless permissible because diversity, unlike a remedial interest, need not be limited, and the Law School in any event, "intends to consider race and ethnicity * * * only until it becomes possible to enroll a 'critical mass' of under-represented minority students through race-neutral means." *Id.* at 37a, 38a.

b. Judge Boggs filed a dissent in which two judges joined. Pet. App. 83a-169a. He concluded that Justice Powell's concurring opinion in *Bakke* lacked precedential effect. See *id.* at 90a-112a. Judge Boggs further concluded that the Law School's interest in diversity is not compelling because its "preference [for] race [is] not * * * a proxy for a unique set of experiences, but * * * a proxy for race itself." *Id.* at 121a-122a. Such diversity is not a compelling interest, he concluded, because it is "poorly defined," has no "logical stopping point," will ultimately result in admissions being "parceled out roughly in proportion to representation in the general population," and "justif[ies] an infinite amount of engineering with respect to every racial, ethnic, and religious class." *Id.* at 125a, 124a, 127a-128a (quoting *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 498 (1989)).

Judge Boggs also concluded that the Law School's admissions policy failed the narrow-tailoring component of strict scrutiny. Pet. App. 130a-156a. Noting that "[i]t is clear from the Law School's statistics that under-represented minority students are nearly automatically admitted in zones where * * * [non-

preferred] students with the same credentials are nearly automatically rejected," he concluded that the magnitude of the preference provided for race and ethnic status was "too large" to be narrowly tailored. *Id.* at 130a, 138a. He also ruled that the Law School's attempt "to produce a 'critical *mass* '" is a quota or an actual effort to enroll a "critical *number* of minority students." He noted that the Law School has admitted between 44 and 47 preferred minority students each year, and has been "more successful at enrolling a precise number of under-represented minorities than a precise number of total students." *Id.* at 141a-142a. In addition, he pointed out that the Law School's claim that a "critical mass" is essential to achieve diversity of viewpoints "seems to depend wholly on the psychological makeup of the people involved," is valid only if all preferred minorities, and no others, are "particularly likely to have experiences and perspectives of special importance," and varies with the specific racial and ethnic group according to its own admissions figures. *Id.* at 150a, 152a, 151a. Finally, Judge Boggs concluded that the admissions program is not narrowly tailored since the Law School's alleged goal of diversity can be more effectively achieved with race-neutral measures that directly focus on unique experiences and viewpoints, rather than race and ethnicity, which are "imperfect prox[ies]" for them. *Id.* at 154a.

c. Judge Gilman also dissented (Pet. App. 171a-176a), concluding that the Law School's admissions policy was not narrowly tailored because it gives "grossly disproportionate weight" to an applicant's race and ethnicity and "is functionally indistinguishable from a quota." *Id.* at 174a, 173a.

SUMMARY OF ARGUMENT

Ensuring that public institutions, especially educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities, is an important and entirely legitimate government objective. Measures that ensure diversity, accessibility and opportunity are important components of government's responsibility to its citizens.

Nothing in the Constitution prevents public universities from achieving these laudable goals because there are a variety of race-neutral alternatives available to achieve the important goals of openness, educational diversity, and ensuring that all students of all races have meaningful access to institutions of higher learning. For example, universities may adopt admissions policies that seek to promote experiential, geographical, political, or economic diversity; modify or discard facially neutral admissions criteria that tend to skew admissions results in a way that denies minorities meaningful access to public institutions; and open educational institutions to the best students from throughout the State or Nation. These are race-neutral policies that have led to racially diverse student bodies. Texas, which has operated without race-based admissions policies since they were invalidated by the Fifth Circuit in 1996, provides a useful example: By attacking the problems of openness and educational diversity directly and focusing on attracting the top graduating students from throughout the State, the Texas program has enhanced opportunity and promoted educational diversity by any measure. Florida and California have adopted similar race-neutral policies with similar results.

In light of these race-neutral alternatives, respondents cannot justify the express consideration of race in their admissions policy. The core commitment of the Equal Protection Clause and this Court's precedents make clear that the government may not resort to race-based policies unless necessary. It may not employ race-based means without considering race-neutral alternatives and employing them if they would prove efficacious.

Not only does the Equal Protection Clause require the government to consider and employ efficacious race-neutral alternatives, but it also demands that any use of race be otherwise carefully calibrated and narrowly tailored. Efforts to use quotas to achieve predetermined levels of racial participation are the very antithesis of such narrow tailoring. However, respondents' admissions policy uses disguised quotas to ensure that each entering class includes a predetermined "critical mass" of certain racial minorities. This Court has repeatedly condemned quotas as unconstitutional, and respondents cannot escape the reach of those cases by pursuing a purportedly flexible, slightly amorphous "critical mass" in lieu of the kind of rigid numerical quotas struck down by this Court in *Bakke*. In practice, respondents' pursuit of a "critical mass" operates no differently than more rigid quotas. Any variations in results from year to year owes more to respondents' inability to predict acceptance rates and total admissions with unfailing accuracy than to any inherent flexibility in the quotas.

Respondents' race-based admissions policy also runs afoul of other factors that this Court has identified as revealing a critical lack of narrow tailoring. For example, the Law School's policy contains no limit on the scope or duration of its racial preferences and the Law

School's approach to admissions would sanction race-based admissions standards indefinitely. Unlike remedial programs, which by their nature seek to remedy past wrongs and move beyond race-based preferences, respondents' pursuit of a critical mass of selected minority students would justify such a policy in perpetuity. Likewise, in part because it operates much like a rigid, numerical quota, respondents' policy imposes unfair and unnecessary burdens on innocent third parties. Accordingly, however its objectives are defined, the Law School's race-based admissions policy fails the narrow tailoring requirement of this Court's strict scrutiny analysis.

In the end, this case requires this Court to break no new ground to conclude that respondents' race-based admissions policy is unconstitutional. This Court has long recognized that the Equal Protection Clause outlaws quotas under any circumstances and forbids the government from employing race-based policies when race-neutral alternatives are available. Those two cardinal principles of equal protection each suffices to invalidate respondents' race-based policy.

ARGUMENT

RESPONDENTS' USE OF RACE-BASED ADMISSIONS CRITERIA IS NOT JUSTIFIED IN LIGHT OF THE AMPLE RACE-NEUTRAL ALTERNATIVES

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. Its central purpose is to guarantee "racial neutrality in governmental decisionmaking." *Miller* v. *Johnson*, 515 U.S. 900, 904 (1995). Accord *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). Thus, the Amendment seeks to "do away with

all governmentally imposed discriminations based on race" and create "a Nation of equal citizens * * * where race is irrelevant to personal opportunity and achievement." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (quoting *Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984)); *Croson*, 488 U.S. at 505-506.

That is particularly true in the context of public educational institutions, which have a duty to "act in accordance with a 'core purpose of the Fourteenth Amendment.'" *Wygant*, 476 U.S. at 277 (plurality opinion) (quoting *Palmore*, 466 U.S. at 432); see *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954); *Sweatt* v. *Painter*, 339 U.S. 629 (1950). In light of the critical role of education, public institutions must make educational opportunity "available to all on equal terms," *Plyer* v. *Doe*, 457 U.S. 202, 223 (1982).

Accordingly, it is now well settled that "[r]acial and ethnic distinctions of any sort are inherently suspect and * * * call for the most exacting judicial examination." *Miller*, 515 U.S. at 904; *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 218 (1995); *Wygant*, 476 U.S. at 273 (plurality opinion) (quoting *University of Cal. Regents* v. *Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.)). It is equally well established that the level of scrutiny does "not depend[] on the race of those burdened or benefitted," or whether the preference may be characterized as benign. *Shaw* v. *Reno*, 509 U.S. 630, 650-651 (1993) (quoting *Croson*, 488 U.S. at 494); see *Adarand*, 515 U.S. at 224; *Bakke*, 438 U.S. at 289-290 (opinion of Powell, J.). Rather, *all* racial classifications are subject to strict judicial scrutiny and are only constitutional if they are narrowly tailored to achieve a compelling interest.

The Law School contends that its interest in enrolling a "diverse" student body is sufficiently compelling

to justify its admitted use of racially discriminatory admissions standards. See Appellants C.A. Br. 30-31 (emphasizing that "racial and ethnic diversity in legal education is important both to a law school's mission in training effective lawyers, and to the perception that our legal system is able to administer equal justice"); *id.* at 31 (citing evidence that "students learn more effectively when they are educated in racially and ethnically diverse environments"); *ibid.* ("given our racial separation, Americans ordinarily have little contact with members of different racial groups, such that exposure to a diverse student body provides unique educational opportunities"). The Law School's interest in "diversity," however, cannot, as a matter of law, justify racial discrimination in admissions in light of the ample race-neutral alternatives.[4]

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[4] The courts of appeals disagree as to whether any of the opinions in *Bakke* represents binding precedent under *Marks* v. *United States*, 430 U.S. 188 (1977). Compare, *e.g.*, Pet. App. 12a-19a (construing *Bakke* to hold that diversity constitutes a compelling interest), and *Smith* v. *University of Wash. Law Sch.*, 233 F.3d 1188, 1198-2000 (9th Cir. 2000) (same), cert. denied, 532 U.S 1051 (2001), with *Eisenberg* v. *Montgomery County Pub. Sch.*, 197 F.3d 123, 131 (4th Cir. 1999) (citing *Bakke* to indicate that Supreme Court has not decided whether diversity is a compelling interest), cert. denied, 529 U.S. 1019 (2000), *Hopwood* v. *Texas*, 78 F.3d 932, 941-944 (5th Cir.) (concluding that only Justice Powell in *Bakke* endorsed the view that diversity is a compelling interest), cert. denied, 518 U.S. 1033 (1996), *Johnson* v. *Board of Regents*, 263 F.3d 1234, 1245-1248 (11th Cir. 2001) (same), and *Brewer* v. *West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000) (noting "the absence of a Supreme Court decision [in *Bakke*] dealing with permissible race-based justifications in the educational context"). The Court need not undertake the *Marks* analysis in this case, and should instead directly resolve the constitutionality of race-based admissions standards by focusing on the availability of race-neutral alternatives. Cf. *Nichols* v. *United States*, 511 U.S. 738, 745-746 (1994) ("We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when [our prior decision] has so obviously * * * divided the lower courts that have considered it."). See also *Johnson*, 263 F.3d at 1248 n.12 (noting in the specific context of *Bakke* that "the Supreme Court has recognized that there will be situations where no binding 'rule' may be taken from a fractured decision, and the *Marks* inquiry is ultimately 'not useful.'") (citation omitted).

A. Public Universities Have Ample Means To Ensure That Their Services Are Open And Available To All Americans

1. Ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective. No segment of society should be denied an opportunity to obtain access to government services and public institutions. Nowhere is the importance of such openness more acute than in the context of higher education. A university degree opens the doors to the finest jobs and top professional schools, and a professional degree, in turn, makes it possible to practice law, medicine, and other professions. If undergraduate and graduate institutions are not open to all individuals and broadly inclusive to our diverse national community, then the top jobs, graduate schools, and the professions will be closed to some.

Nothing in the Constitution requires public universities and governments to close their eyes to this reality or to tolerate artificial obstacles to educational opportunity. Public universities have substantial latitude to tackle such problems and ensure that universities and other public institutions are open to all and that student bodies are experientially diverse and broadly representative of the public. Schools may identify and discard

facially neutral criteria that, in practice, tend to skew admissions in a manner that detracts from educational diversity. They may also adopt admissions policies that seek to promote experiential, geographical, political, or economic diversity in the student body, which are entirely appropriate race-neutral governmental objectives. The adoption of such policies, moreover, has led to racially diverse student bodies in other States. And public universities can address the desire for broad representation directly by opening educational institutions to the best students from throughout the State or Nation and easing admissions requirements for all students.

2. For example, in Texas, which has operated without race-based admissions policies since they were invalidated by the Fifth Circuit in 1996, the undergraduate admissions program focuses on attracting the top graduating students from throughout the State, including students from underrepresented areas. See Tex. Educ. Code Ann. § 51.803 (West 2001). By attacking the problems of openness and educational opportunity directly, the Texas program has enhanced opportunity and promoted educational diversity by any measure. See David Montejano, *Access to the University of Texas at Austin and the Ten Percent Plan: A Three Year Assessment, Admissions Research at UT Austin* (last modified Jan. 13, 2003) <http://www.utexas.edu/student/research/reports/admissions/Montejanopaper. htm>.

Under this race-neutral admissions policy, "pre-*Hopwood* diversity levels were restored by 1998 or 1999 in the admitted and enrolled populations and have held steady." Gary M. Lavergne & Dr. Bruce Walker, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of*

Texas at Austin 3 (last modified Jan. 13, 2003) <http://www.utexas.edu/student/research/reports/admissions/HB588-Report5.pdf>. Thus, in 1996, the last year race was used in University of Texas admissions decisions, 4% of enrolled freshmen were African Americans, 14% were Hispanic, and less than 1% were Native Americans. In 2002, 3% of enrolled freshmen were African American (this figure has fluctuated between 4% and 3% since 1997), 14% were Hispanic, and less than 1% were Native American. *Id.* at 3-4.

Similar race-neutral programs are now in place in California and Florida and have had similar results. Florida adopted its "One Florida Initiative" in 2000, as part of a broad array of educational reforms. Under this initiative, all of Florida's public universities are precluded from considering race in undergraduate and graduate admissions decisions. The undergraduate rule was effective for Fall 2000 admissions, and the graduate and professional rule was implemented for Fall 2001 admissions. In addition, Florida adopted the Talented Twenty program, which guarantees admission to the state university system to the top 20% of students at Florida high schools. Florida also has in place the 2+2 program, which guarantees a student who successfully completes a two-year degree at a community college entrance into the State University System, allowing students initially denied university admission a second chance. See Fla. Admin. Code Ann. r. 6C-6.002(7) (2002).

Since adopting its race-neutral admissions policy, Florida has maintained or increased the number of minority students enrolled in its public universities. See *One Florida Accountability Commission* at Chart 3 (June 17, 2002) <http://www.myflorida.com/myflorida/government/otherinfo/ppts/enrollment2.ppt>. In the

last year before the effective date of its new race-neutral policy (1999-2000), the percentage of entering minority students enrolled in Florida's undergraduate institutions was 36.6%. Two years later that percentage is 36.68%. *Ibid.* At Florida State University, African-American student enrollment rose from 11.01% in 1999-2000 to 11.85% in 2001-2002. *One Florida Accountability Commission* at Chart 7 (June 17, 2002) <http://www.myflorida.com/myflorida/government/otherinfo/documents/enrollment-3.xls>. Hispanic student enrollment also increased, rising from 8.74% to 12.85% following the adoption of the race-neutral admissions policy. *Ibid.* At the University of Florida, African-American and Hispanic student enrollment has declined slightly during this same period, from 9.95% to 7.15% and from 11.38% to 11.13%, respectively. *Ibid.* Even with this decline, however, the University of Florida has maintained a significant minority representation under its race-neutral admissions policy.[5] Florida's graduate, medical, and business schools are also enrolling approximately the same or greater numbers of minority students after adoption of the race-neutral admissions policy. See *One Florida Accountability Commission* at Chart 4 (June 17, 2002) <http://www.myflorida.com/myflorida/government/otherinfo/ppts/enrollment3.ppt>. System-wide minority enrollment in graduate programs has

[5] Preliminary admissions data shows that the African-American enrollment in 2002-2003 is up 43.26% from the previous year while Hispanic enrollment has risen by 13.13%. System-wide minority enrollment will remain steady at approximately 36%. See Lt. Governor's Press Release (Sept. 6, 2002) <http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/enrollment-9-6-02. html>.

increased from 21.6% in 2000-2001 to 24.95% in 2001-2002. *Ibid.*

California has experienced similar results since adopting a race-neutral admissions policy that guarantees admission to California students graduating in the top 4% of their high school class. In 1997, the last year that race was considered in admissions, African American, Hispanic, and Native American students comprised 3.7%, 14.3%, and 0.8% of admitted freshmen students, respectively. In 2002, under the race-neutral policy, those figures were 3.3%, 15.1%, and 0.6%, respectively. Accordingly, the subtotal of the admitted freshmen students that were "underrepresented minorities" in 1997, the last year race was considered in admissions, was 18.8%, whereas in 2002, under the race-neutral policy, that figure is 19.1%. See *University of California Freshman Admits from California Fall 1997 to 2002* (last modified Apr. 3, 2002) <http://www.ucop.edu/news/factsheets/2002/admissions_ethnicity.pdf>.

As the experience in Texas, Florida, and California demonstrates, public universities have ample race-neutral means available to achieve objectives such as educational diversity, openness, and broad participation. The Constitution intrudes on the university admissions process only by preventing public universities from making admission decisions based on race, except as a narrowly tailored response to a compelling interest. Absent such impermissible race-based admissions decisions, university officials may pursue whatever mix of goals they deem appropriate. They are free to pursue goals, such as experiential diversity, that have had the effect of ensuring minority access to institutions of higher learning. But they cannot follow Michigan's model of adopting race-based admissions policies when ample race-neutral alternatives remain available and

have proven to enhance educational opportunity in other States.

B. These Ample Race-Neutral Alternatives Render Respondents' Race-Based Policy Both Unnecessary And Unconstitutional

The Equal Protection Clause provides that race-based measures are permissible only to the extent to which the asserted interest may not be achieved "without classifying individuals on the basis of race." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality opinion). The Court has repeatedly emphasized that the failure to consider available race-neutral means and employ them if efficacious is a critical factor that causes a program to fail the strict scrutiny test. See, *e.g.*, *Adarand*, 515 U.S. at 237-238 (directing the lower court on remand to "address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting") (citation omitted); *Croson*, 488 U.S. at 507 (noting "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting"); accord *Metro Broad., Inc.* v. *FCC*, 497 U.S. 622 (1990) (O'Connor, J., dissenting) ("the FCC's programs cannot survive even intermediate scrutiny because race-neutral and untried means of directly accomplishing the governmental interest are readily available"); accord John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 n.26 (1974).

In *Wygant*, for example, the plurality observed that the "term 'narrowly tailored' * * * require[s] consideration of whether lawful alternative and less restrictive means could have been used." 476 U.S. at 280 n.6. In conducting that inquiry, courts "should give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense." *Ibid.* (citations omitted). Likewise, in *Croson*, the plurality emphasized that "the city ha[d] at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races." 488 U.S. at 509.

Although respondents have not been clear about what they mean by diversity, we assume that they are not pursuing racial diversity for its own sake. See *Bakke*, 438 U.S. at 307 (opinion of Powell, J.) ("[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake"). In any event, respondents' race-based policy is not necessary to ensure that minorities have access to and are represented in institutions of higher learning. The ability of race-neutral alternatives, such as those adopted in Texas, Florida, and California, to achieve diversity by any measure and however defined make clear that respondents' policy fails this fundamental tenet of the Court's narrow-tailoring decisions.

In addition, to the extent the Law School seeks candidates with diverse backgrounds and experiences and viewpoints or "achievements in light of the barriers [an applicant has] had to overcome," *DeFunis* v. *Odegaard*, 416 U.S. 312, 331 (1974) (Douglas, J., dissenting), it can focus on numerous race-neutral factors including a history of overcoming disadvantage, geographic origin, socioeconomic status, challenging living or family situations, reputation and location of high school, volunteer and work experiences, exceptional personal talents,

leadership potential, communication skills, commitment and dedication to particular causes, extracurricular activities, extraordinary expertise in a particular area, and individual outlook as reflected by essays. See *Metro Broad.*, 497 U.S. at 623 (O'Connor, J., dissenting). Such a system of seeking experiential diversity directly would lead to the admission of a more diverse student body than the Law School's current race-based admissions policy. Such programs have produced school systems to which minorities have meaningful access and are represented in significant numbers, as the experience in Texas, Florida, and California demonstrates. Such a system would also avoid running afoul of the principle this Court has stressed in a wide variety of contexts that the Equal Protection Clause does not allow governmental decision-makers to presume that individuals, because of their race, gender, or ethnicity think alike or have common life experiences.[6]

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[6] See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) ("[s]upposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications"); *Miller*, 515 U.S. at 914 (explaining that the Equal Protection Clause forbids the belief that "individuals of the same race share a single political interest [since] [t]he view that they do is 'based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens'") (quoting *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting)); *Shaw*, 509 U.S. at 647 (rejecting the perception "that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same * * * interests," or have a common viewpoint about significant issues); *Wygant*, 476 U.S. at 316 (Stevens, J., dissenting) (internal citation and quotation marks omitted) (noting that the "premise that differences in race, or in the color of a person's skin, reflect real differences * * * is utterly irrational and repugnant to the principles of a free and democratic society").

Indeed, such a race-neutral policy would be superior to race-based policies in numerous ways. It would treat all applicants as individuals. It would also focus on "a far broader array of qualifications and characteristics." *Bakke*, 438 U.S. at 315 (opinion of Powell, J.). It would apply to minorities beyond those belonging to the currently preferred groups who have extraordinary life experiences, unusual motivation, or the ability to succeed in the face of significant obstacles. See *Adarand*, 515 U.S. at 238 (explaining that race- and ethnic-based presumptions are simultaneously both over- and underinclusive); *Metro Broad.*, 497 U.S. at 617-622 (O'Connor, J., dissenting) (same); *Croson*, 488 U.S. at 515 (Stevens, J., concurring) (suggesting the inappropriateness of racial classification that benefits all minorities without regard to individual experience); *DeFunis*, 416 U.S. at 331-332 (Douglas, J., dissenting).

The Law School, however, has not sought to implement its goals through race-neutral means. Instead, respondents have adopted a system that both applies substantial race-based preferences and ensures that a "critical mass" of particular minority groups are admitted. This failure to consider and implement efficacious race-neutral alternatives is sufficient to render the program unconstitutional. The use of race in the face of such alternatives demonstrates that respondents have not employed race in a narrowly tailored manner.[7]

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[7] If race-neutral alternatives were not efficacious—as they clearly are here—in ensuring that minorities have access to and are represented in institutions of higher learning (and if respondents had avoided the use of quotas see, pp. 22-25, *infra*), then the question whether race could ever be a consideration would arise. That question, in turn, would depend on whether the State had asserted a compelling interest (and whether its use of race were

C. The Law School's Admissions Program Operates As An Impermissible Quota System

Another consistent theme in this Court's Equal Protection Clause jurisprudence is that, under no circumstances, may the government resort to racial quotas. It has long been established that, even where the Constitution permits consideration of race, it generally forbids the use of racial quotas. See *Bakke*, 438 U.S. at 319-320 (opinion of Powell, J.); *Croson*, 488 U.S. at 499; *Wygant*, 476 U.S. at 276. Respondents' race-based pursuit of a critical mass of students from particular racial groups cannot be reconciled with these precedents.

Respondents' race-based pursuit of a predetermined "critical mass" is not meaningfully different from the strict numerical quotas this Court invalidated in *Bakke*. Variations in the ultimate number of enrolled minorities has more to do with respondents' inability to predict rates of acceptance with absolute precision than it does to any true flexibility that would meaningfully distance the program from more traditional quotas. The Dean and Director of Admissions consult "daily admissions reports" that reflect "how many students from various racial groups have applied, how many have been accepted, how many have been placed on the waiting list, and how many have paid a deposit." Pet. App. 230a; see *id.* at 225a-226a, 229a-230a. As a result of those race-based efforts, the Law School has been able to admit the desired "critical mass" numbers of selected minority groups with a remarkable degree of consistency, enrolling between 44 and 47 African-American, Native-American, and Hispanic students each year from 1995-1998. Indeed, as Judge Boggs

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otherwise narrowly tailored). The Court need not reach that question in this case.

noted in dissent below, the Law School has been "more successful at enrolling a precise number of under-represented minorities than a precise number of total students." *Id.* at 142a; see *id.* at 143a. Accordingly, the admissions policy's terms and stated purpose, the admissions data, and the Law School's conduct all demonstrate that the Law Schools's reliance on the concept of "critical mass" is nothing less than a rigid, numerical target that amounts to a quota. Cf. *Bakke*, 438 U.S. at 316 (opinion of Powell, J.) (approving of the Harvard Plan in part because it "has no[] set target-quotas").

The fact that the Law School's target may be a range, rather than a fixed percentage does not make it any less a quota. See, *e.g.*, *DeFunis*, 416 U.S. at 332-333 n.12 (Douglas, J., dissenting) (concluding that it is "irrelevant to the legal analysis" whether the admissions committee has "chosen only a range" or "set a precise number in advance" for minority admissions); *Fishermen's Dock Coop., Inc.* v. *Brown*, 75 F.3d 164, 169 (4th Cir. 1996) (defining quota as a range). By definition, a range designates the share to be allocated by establishing both a minimum and maximum amount. As a result, like a quota, a range ensures that a certain share of spaces will be allocated to a racial group, and that other students will not be eligible to compete meaningfully for those spaces solely because of their race. See *Bakke*, 438 U.S. at 288-289 n.26.

The fact that the Law School enrolls preferred minorities in percentages "roughly equal" to their percentages in the applicant pool "supports the inference that [it] seeks to allocate [places in an entering class] based on race." Pet. App. 226a; see *Metro Broad.*, 497 U.S. at 625 (O'Connor, J., dissenting); Pet. App. 227a-228a. After all, if the "critical mass" were truly an undefined number or percentage, as the Law School

claims, actual enrollment figures for preferred minority applicants would not consistently reflect their percentages in the total applicant pool. *Id.* at 226a-227a. Accordingly, the Law School's race-based efforts to admit a "critical mass" is nothing less than a quota that ensures that it enrolls an ethnically and racially diverse student body that mirrors the percentages of preferred ethnic and racial groups within the applicant pool. Cf. *Tuttle* v. *Arlington County Sch. Bd.*, 195 F.3d 698, 707 (4th Cir. 1999), cert. dismissed, 529 U.S. 1050 (2000) ("Even if the final results may have some statistical variation, what drives the entire [admissions] process—the determination of whether it applies and the values of its weights—is racial balancing.").

Respondents' race-based efforts to enroll a critical mass of students from particular minority groups poses the same dangers as more traditional quotas. Those efforts to ensure a critical mass of certain minority groups necessarily allows administrators to discriminate against members of any group it believes are overrepresented in Law School classes or otherwise do not contribute to the desired racial mix of the student body. Because "every racial classification helps * * * some races and hurts others" and a "'benign' [preference] means only what shifting fashions and changing politics deem acceptable," to endorse the Law School's pursuit of a critical mass is to allow universities to discriminate against members of minority groups that are currently disfavored, politically unpopular, or simply out of vogue with academicians. *Adarand*, 515 U.S. at 241 n*; *Metro Broad.*, 497 U.S. at 615 (O'Connor, J., dissenting); see *Bakke*, 438 U.S. at 298 (opinion of Powell, J.).

The prospects that respondents' "critical mass" rationale could be used to discriminate against certain races is far from theoretical. By admitting racial minorities that are given weight by respondents in attaining their critical mass, respondents discriminate against other racial minorities that are deemed not to contribute to the critical mass. The Court should reaffirm its clear prohibition on quotas and not "surrender[] * * * [its] role in enforcing the constitutional limits on race-based official action," nor make public universities "ready weapons * * * to oppress those * * * individuals who by chance are numbered among unpopular or inarticulate minorities." *Miller*, 515 U.S. at 922; *Batson* v. *Kentucky*, 476 U.S. 79, 87 n.8 (1986) (quoting *Akins* v. *Texas*, 325 U.S. 398, 408 (1945) (Murphy, J., dissenting)).[8]

D. Other Requirements Of This Court's Narrow Tailoring Analysis Reinforce The Unconstitutionality Of Respondents' Race-Based Admissions Policy

Beyond the need to employ race-neutral alternatives and avoid quotas, this Court has considered a variety of factors in determining whether race-based programs are narrowly tailored, including (1) the planned dura-

[8] The Law's School's empirical evidence does little to advance its claim. The Court has "made abundantly clear * * * that * * * classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994); see *Metro Broad.*, 497 U.S. at 620 (O'Connor J., dissenting) (even assuming the "equation of race and programming viewpoint has some empirical basis, equal protection principles prohibit the Government from relying upon that basis to employ racial classifications") (citing *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 645 (1975)). If all a university "need do is find * * * report[s]," studies, or recommendations "to enact" a race-based admissions policy, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Croson*, 488 U.S. at 504.

tion of the policy, (2) the relationship between the numerical goal and the percentage of minority group members in the relevant population, (3) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (4) the burden of the policy on innocent third parties. See, *e.g.*, *United States* v. *Paradise*, 480 U.S. 149, 171 (1987); *Croson*, 488 U.S. at 507-510; *Wygant*, 476 U.S. at 267-269; *Fullilove* v. *Klutznick*, 448 U.S. 448, 463-467 (1980); *Tuttle* v. *Arlington County Sch. Bd.*, 195 F.3d 698, 705-707 (4th Cir. 1999), cert. dismissed, 529 U.S. 1050 (2000). As consideration of these factors confirms, regardless of how the University's interest in diversity is defined, the Law School's admissions policy is not narrowly tailored to achieve any conceivable compelling interest.

1. *The Law School's admissions policy would permit race-based discrimination in perpetuity*

The Law School's admissions policy is not narrowly tailored because its reliance on race-based decisionmaking "has no logical stopping point" and would permit racially discriminatory admissions standards in perpetuity. *Croson*, 488 U.S. at 498; see *Wygant*, 476 U.S. at 275 (plurality opinion); *Metro Broad.*, 497 U.S. at 613, 614 (O'Connor, J., dissenting). The Law School's policy "provides no guidance * * * [as to] the * * * scope of the * * * [preference]" or how long race must be relied upon to attain it. *Croson*, 488 U.S. at 498 (quoting *Wygant*, 476 U.S. at 275). Indeed, the logic and inevitable outcome of the Law School's "critical mass" rationale would permit the university to rely on racial and ethnic admissions preferences indefinitely to obtain and sustain any racial balance, including proportional representation or "outright racial balancing," it believes contributes to its educational mission. *Metro Broad.*, 497 U.S. at 625 (O'Connor, J., dissenting) (quoting *Croson*, 488 U.S. at 507).

Unlike remedial programs that, by design, aim for obsolescence by seeking to remedy the discrimination that justifies a race-based remedy, the pursuit of a critical mass of minority students has no logical stopping point. That pursuit would justify race-based measures that are "ageless in their reach * * * and timeless in their ability to affect the future," *Wygant*, 476 U.S. at 276; accord *Croson*, 488 U.S. at 497-498, and would "assure[] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race,' will never be achieved." *Croson*, 488 U.S. at 495 (quoting *Wygant*, 476 U.S. at 320 (Stevens, J., dissenting) (footnote omitted)). This Court has never found such an open-ended and potentially unlimited racial preference narrowly tailored.

2. *The Law School's admissions policy places a disproportionate emphasis on racial considerations*

The Law School's admissions policy, and in particular its "critical mass" numerical goal, places a disproportionate emphasis on race. See Pet. App. 131a-152a. In *Bakke*, Justice Powell concluded that Davis Medical School's admissions program was unconstitutional in part because race was a "decisive" factor that "insulate[d] [preferred minority applicants] from comparison with all other candidates for the available seats." 438 U.S. at 317. Respondents' policies suffer the same fundamental defects.

Here, the district court found that the Law School's preference provided to candidates who are members of favored minority groups is "enormous" and allows them

to be accepted in significantly greater proportions than white applicants with the same or similar index scores. Pet. App. 227a; see *id.* at 225a (finding that "evidence indisputably demonstrates that the [L]aw [S]chool places a very heavy emphasis on an applicant's race in deciding whether to accept or reject"). As Judge Boggs pointed out in his dissent, "[i]t is clear from the Law School's statistics that under-represented minority students are nearly automatically admitted in zones where white or Asian students with the same credentials are nearly automatically rejected." *Id.* at 138a; see *id.* at 226a-228a. The Law School thus impermissibly relies on race as a "decisive factor," "at least to the extent necessary to enroll a 'critical mass'" of favored minority students. *Id.* at 225a, 229a; see *Bakke*, 438 U.S. at 315, 317 (opinion of Powell, J.).

3. *The Law School's race-based admissions policy unfairly burdens innocent third parties*

The Court has recognized that "[t]he American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance" in part because "education provides the basic tools by which individuals * * * lead economically productive lives to the benefit of us all." *Plyler*, 457 U.S. at 221 (quoting *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923)). It has also explained that government should not impose "barriers presenting unreasonable obstacles to advancement on the basis of individual merit" since "[t]he promise of equality under the law [ensures] that all citizens, regardless of race, ethnicity, or gender, have the chance to take part." *Plyler*, 457 U.S. at 222; *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994); *Georgia* v. *McCollum*, 505 U.S. 42, 59 (1992) (quoting *Ristaino* v. *Ross*, 424 U.S. 589, 596 n.8 (1976)).

The Law School's discriminatory admissions criteria unfairly burden qualified applicants not subject to its preference by accepting favored minority candidates who have lesser objective qualifications. As the Court has explained, "[t]he exclusion of even one [person] * * * for impermissible reasons harms that [individual] and undermines public confidence in the fairness of the system." *J.E.B.*, 511 U.S. at 142 n.13; see *Bakke*, 438 U.S. at 361 (opinion of Brennan, White, Marshall & Blackmun, JJ.) (noting that "advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at least on factors within the control of an individual").

* * * * *

In the final analysis, this case does not require this Court to break any new ground to hold that respondents' race-based admissions policy is unconstitutional. Two cardinal principles of this Court's Equal Protection Clause jurisprudence stand as obstacles to respondents' race-based admissions policy. The policy's use of race is not necessary in light of the race-neutral alternatives available. The policy's adoption of quotas, however imprecise, to achieve its goals violates the Constitution.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

BRIAN W. JONES
General Counsel
Department of Education

RALPH F. BOYD, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

DAVID B. SALMONS
Assistant to the Solicitor General

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